Supreme Court, U.S.
FILED
JUN 30 1998
CLERK

No. 97-1928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VERNA EMERY,

Petitioner,

—v.—

AMERICAN GENERAL FINANCE, INC.,
AMERICAN GENERAL FINANCE, CORP.,
and JOHN DOES 1-10,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL W. SCHROEDER
Counsel of Record
JAMES R. DALY
JAYANT W. TAMBE
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, Illinois 60606
(312) 782-3939

Counsel for Respondents

23 pp

QUESTIONS PRESENTED

I. Whether this Court should deny review of the lower court's application of the well-settled pleading requirements of Fed. R. Civ. P. 9(b) to the factual allegations of the complaint, finding that Petitioner had failed to plead more than one instance of mail fraud and, thus, a pattern of racketeering activity.

II. Whether this Court should deny review of the fact-bound decision below, which correctly applied well-settled law and found that Petitioner failed to plead a viable RICO enterprise distinct from the alleged RICO person.

III. Whether this Court should deny review of the lower court's rejection of Petitioner's vague "John Doe" pleading, which ruling was fully consistent with the requirements of Rule 9(b) and the First Circuit's decision in *Oreto*.

STATEMENT PURSUANT TO RULE 29.6

Respondent American General Finance, Inc., an Illinois corporation, is a wholly-owned subsidiary of Respondent American General Finance, Corp., an Indiana corporation. Respondent American General Finance, Corp. is a wholly-owned subsidiary of American General Finance, Inc., an Indiana Corporation. Neither American General Finance, Inc. (Illinois), nor American General Finance Corp. (Indiana) have any non-wholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT 1

a. The Nature Of The Case 1

b. The Original Complaint 2

c. The First Appeal 3

d. The Amended Complaint 3

e. The Second Amended Complaint 4

f. The Dismissal Of The Second Amended Complaint . . 5

g. The Second Appeal 7

REASONS FOR DENYING THE WRIT 8

I. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED LAW IN FINDING THAT EMERY HAD FAILED TO PLEAD MORE THAN ONE INSTANCE OF MAIL FRAUD. 8

II. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED LAW IN FINDING THAT EMERY HAD FAILED TO PLEAD A VIABLE

RICO ENTERPRISE DISTINCT FROM THE ALLEGED RICO PERSON. 11

III. THE DECISION BELOW CORRECTLY REJECTED PETITIONER'S "JOHN DOE" CLAIM AND DOES NOT CONFLICT WITH THE FIRST CIRCUIT'S DECISION IN *ORETO*. 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Emery v. American General Finance, Inc.,
873 F. Supp. 1116 (N.D. Ill. 1994) 2

Emery v. American General Finance, Inc.,
71 F.3d 1343 (7th Cir. 1995) 3, 5

Emery v. American General Finance, Inc.,
938 F. Supp. 495 (N.D. Ill. 1996) 3, 4

Emery v. American General Finance, Inc.,
952 F. Supp. 602 (N.D. Ill. 1997) 5, 6

Emery v. American General Finance, Inc.,
134 F.3d 1321 (7th Cir. 1998) ..... *passim*

Emery v. American General Finance, Inc.,
No. 97 L 3093 (Cir. Ct. Cook Cty. Ill.) 6

Fitzgerald v. Chrysler Corp., 116 F.3d 225
(7th Cir. 1997) 12

H.J., Inc. v. Northwestern Bell Telegraph Co.,
492 U.S. 229 (1989) 8

Haroco, Inc. v. America National Bank Co.,
747 F.2d 384 (7th Cir. 1984), *aff'd*
on other grounds, 473 U.S. 606 (1985) 12, 13

Jaguar Cars, Inc. v. Royal Oaks Motor
Car Co., 46 F.3d 258 (3d Cir. 1995) 14

Michaels Bldg. Co. v. Ameritrust Co., N.A.,
848 F.2d 674 (6th Cir. 1988) 9, 10

New England Data Serv., Inc. v. Becher,
829 F.2d 286 (1st Cir. 1987) 9, 10

Reves v. Ernst & Young, 507 U.S. 170 (1993) 13

Richmond v. Nationwide Cassel, L.P.,
52 F.3d 640 (7th Cir. 1995) 13

Schiffels v. Kemper Fin. Serv., Inc.,
978 F.2d 344 (7th Cir. 1992) 9, 10

United States v. Oreto, 37 F.3d 739 (1st Cir. 1994) 14, 15

STATUTES AND RULES

18 U.S.C. § 1961(5) 8

18 U.S.C. § 1962(c) ..... *passim*

Fed. R. Civ. P. 11 ..... 6, 9

Fed. R. Civ. P. 9(b) ..... *passim*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents American General Finance, Inc. ("AGFI") and American General Finance, Corp. ("AGFC") (collectively, "Respondents"), respectfully submit this brief in opposition to the Petition of Verna Emery for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

STATEMENT

Petitioner Verna Emery, despite having been afforded three opportunities to do so, could not state a claim that met the well-settled pleading requirements of Section 1962(c) of Title IX of the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations ("RICO"), and Rule 9(b) of the Federal Rules of Civil Procedure. In her petition for a writ of certiorari, Emery distorts beyond all recognition the ruling below, written by Chief Judge Posner for a unanimous panel, that affirmed the dismissal of her Second Amended Complaint. At bottom, and notwithstanding Emery's contentions to the contrary, the court below applied settled pleading standards to the factual allegations of Emery's complaint and concluded that those allegations failed to state a claim under RICO. That ruling was correct and plainly does not conflict with the rulings of any other federal courts of appeals. Nor is there any other "compelling reason" for this Court, in the exercise of its discretion, to grant review.

a. The Nature Of The Case

Emery's theory of the case was that, through allegedly misleading mailings, Respondents solicited loan customers to borrow money and then, instead of making a separate loan, refinanced their original loan and advanced additional funds pursuant to a new loan, which allegedly was economically disadvantageous to the customers. (Petition at 3; *see also* Second Amended Complaint, reproduced at pages 19 to 42 of Petitioner's Appendix ("App."), at App. 19, 29-30 (¶¶ 1, 60-

64).) Emery contended that this alleged "practice" was a "scheme or artifice to defraud" that violated the federal mail fraud statute. (App. 35 (¶¶ 81-83).) Based on these contentions, Emery purported to assert claims for violation of Section 1962(c) of RICO on behalf of herself and a putative class of similarly situated persons against defendants AGFI, AGFC (AGFI's parent company), and John Does 1-10. Emery also purported to assert claims against AGFI and AGFC for violation of "some or all" of the consumer fraud statutes of the fifty states and the District of Columbia.

A brief recitation of the procedural history of this matter is helpful to put the allegations of the Second Amended Complaint in context.

b. The Original Complaint

In her original Complaint, Emery named AGFI as the sole RICO "person" and claimed that she was deceived by an allegedly misleading mailing from AGFI. In conclusory fashion, Emery also claimed that AGFI had done the same thing to other of its customers. Emery alleged that AGFI devised and implemented the allegedly fraudulent scheme and conducted the affairs of each of the following enterprises through a pattern of racketeering activity: (i) American General Corporation ("AGC") (AGFC's ultimate parent holding company), and (ii) the corporate group headed by AGC. Based on those allegations, Emery's original Complaint purported to state a claim against AGFI for violation of Section 1962(c) of RICO.

The district court granted AGFI's motion to dismiss the original Complaint, finding that AGFI could not be liable under RICO for mail fraud because AGFI's mailing to Emery was, as a matter of law, neither deceptive nor misleading and AGFI had no duty to disclose to Emery the relative costs of a refinancing. *Emery v. American General Finance, Inc.*, 873 F. Supp. 1116, 1121-22 (N.D. Ill. 1994).

c. The First Appeal

The court of appeals reversed, finding that "[t]here is a state of facts consistent with the complaint that if proved would establish a violation of the mail fraud statute." *Emery v. American General Finance, Inc.*, 71 F.3d 1343,1348 (7th Cir. 1995) ("*Emery I*"). Nevertheless, the court specifically held that Emery had failed to plead a pattern of racketeering activity:

> [T]he plaintiff must prove a "pattern of racketeering" consisting of at least *two* separate criminal acts. *Where the acts are acts of fraud, the circumstances of each act must be pleaded with particularity*. . . . There are no names or dates or other details of transactions involving any other customer besides Emery. *These details . . . are necessary to identify a violation of RICO, which requires (in this case) more than one fraud and only one is alleged to have been perpetrated* against Emery herself.

Id. (citations omitted) (emphasis added). Therefore, the court concluded that dismissal of the Complaint was proper, but that Emery should have been given an opportunity to amend. *Id*.

d. The Amended Complaint

The Amended Complaint identified some of the details of the transactions of two other AGFI customers -- Tawanna Gill and Tonia Carr. That attempt fell short of the mark, however, because Emery failed to allege "that either of these customers received a misleading solicitation through the mail, or even made their own payments through the mail." *Emery v. American General Finance, Inc.*, 938 F. Supp. 495, 499 (N.D. Ill. 1996). Accordingly, the district court concluded that Emery had once again failed to plead a pattern of racketeering activity. *Id*.

The Amended Complaint also sought to impose RICO liability, not on AGFI as before, but instead on AGFC, for the very same conduct that had been previously alleged against its subsidiary, AGFI. Concluding that these amendments "work[ed] to [Emery's] detriment, not benefit," *id.* at 496, the district court held that Emery had failed to plead a RICO enterprise distinct from the alleged RICO person:

> The complaint alleges that all of the businesses are conducted in accordance with directions given and policy set by AGFC. *The complaint further alleges that the businesses are operated centrally without regard to their nominal existence*, and that it is AGFC that controls and operates all of the corporate group including AGC. In essence, plaintiff alleges that *the corporations ignore all legal formalities*. Accepting these allegations as true, as the court must, *AGFC is at all times conducting its own affairs, and not the affairs of AGC, leaving no distinction between the RICO person and the enterprise*. . . . Plaintiff has been unable to allege that the activities of AGFC are in any meaningful way different from those of the subsidiary AGFI, or the group of corporations together.

Id. at 498-99 (emphasis added).) Accordingly, the district court concluded that Emery failed to allege a RICO enterprise separate and distinct from the alleged RICO person.

e. The Second Amended Complaint

Although the Amended Complaint was initially dismissed with prejudice, Emery requested and was granted leave to amend yet again. For her third attempt to plead more than one instance of mail fraud, Emery alleged, entirely "on information and belief," that Gill and Carr -- two alleged additional "victims" -- received "solicitation[s] substantially similar" to

Emery's. (App. 24, 26 (¶¶ 33, 45).) The Second Amended Complaint also proffered Bessie Chalmers as an additional "victim," claiming "[o]n information and belief, [that] Chalmers responded to [a] solicitation in her monthly statement . . . contacted AGFI for a new loan . . . [and] obtained what she believed was a new loan, as indicated on Exhibit U, when, as indicated by Exhibit V, a substantial portion of the loan was used to pay the prior account." (App. 27-28 (¶¶ 52, 56).)

With respect to the alleged RICO persons, the Second Amended Complaint reshuffled the allegations of the two complaints that preceded it. This time around, Emery sought to hold both AGFI *and* AGFC liable as RICO persons and, in a move towards even more evasive pleading, added a RICO claim against ten "John Doe" defendants, who were described only as "the individuals responsible for devising the policies used each by AGC, AGFC, and AGFI and other subsidiaries." (App. 21 (¶ 12).) The Second Amended Complaint further charged that AGFC, AGFI and/or the "John Doe" defendants allegedly conducted or participated in the affairs of the same three enterprises identified in the Amended Complaint -- AGC, the AGC Group and the AGFC Group -- through a pattern of racketeering activity. (App. 35-36, 38 (¶¶ 85, 92, 100).)

f. The Dismissal Of The Second Amended Complaint

In dismissing the Second Amended Complaint, the district court held that Emery had once again failed to plead a pattern of racketeering activity with particularity as required by Rule 9(b), leaving her allegations "with the exact deficiencies identified by the Seventh Circuit [in *Emery I*]." *Emery v. Am. Gen. Finance, Inc.*, 952 F. Supp. 602, 605 (N.D. Ill. 1997). In particular, the court rejected Emery's attempt to avoid Rule 9(b) by pleading on "information and belief" and held that Emery had once again failed to allege that either Gill or Carr had received a misleading mailing. *Id.* at 604-05. As for Chalmers, the third alleged "victim," the district court held that the

exhibits to the Second Amended Complaint flatly contradicted Emery's allegations. *Id.* at 605.[1] The district court thus concluded that Emery had for the third time alleged only one act of mail fraud with particularity, and had therefore failed to plead adequately a pattern of racketeering activity. *Id.*

The district court also found that Emery had failed again to satisfy Section 1962(c)'s distinctiveness requirement by alleging nothing more than alleged RICO persons conducting their own corporate affairs rather than conducting, or participating in the conduct of, the affairs of any of the alleged enterprises. *Id.* at 605-606. Following dismissal of the federal claims with prejudice, the district court declined to exercise jurisdiction over the supplemental state consumer fraud claim. *Id.* at 606.[2]

g. The Second Appeal

On appeal, the Seventh Circuit affirmed the dismissal of Emery's Second Amended Complaint on both grounds identified in the district court's ruling. (App. 2.) In so ruling, the court

---

1 The court concluded that the alleged "solicitation" Chalmers received could not have played any role in her decision to borrow additional funds because (i) both the alleged "solicitation" contained in the monthly account statement and the alleged "new loan" Chalmers obtained in response to that "solicitation" were dated March 29, 1995, and (ii) the monthly account statement containing the alleged solicitation also contained a summary of the alleged "new loan." *Id.* Indeed, the district court noted that the Chalmers allegations bordered on a violation of Rule 11 of the Federal Rules of Civil Procedure. *Id.*

2 Emery has since refiled her state law claim, as a putative class action, in the Circuit Court of Cook County, Illinois. *Emery v. American General Finance, Inc.*, No. 97 L 3093 (Cir. Ct. Cook Cty. Ill.).

noted that "while it is possible that the deficiencies of the complaint could be cured by further pleading, the plaintiff has had three chances over the course of three years to state a claim and the district judge was not required to give her another chance." (*Id.* (citations omitted)).

Regarding Emery's efforts to plead more than one instance of mail fraud, the court of appeals concluded that, despite naming additional "victims," Emery had failed to plead what, if any, mailing those persons received. (*Id.* at 3.) The court noted that Emery's allegation that the additional victims had received a mailing "substantially similar" to that received by Emery was inadequate because those letters "could be substantially similar yet not misleading." (*Id.*) The court of appeals also rejected Emery's allegations regarding Chalmers because those allegations were defeated by the very documents upon which they purportedly were based. (*Id.* at 2-3.)

In concluding that Emery had failed to plead more than one instance of mail fraud with particularity, the court acknowledged the substantial pleading burden imposed by Rule 9(b). (*Id.* (pleading a RICO "pattern" requires Emery to "satisfy Rule 9(b) as it were twice"). However, the court rejected Emery's arguments that she could not have pleaded the necessary details because Emery had failed to make the necessary showing that she could not have obtained the missing information without discovery. (*Id.* at 3-4.) Thus, the court concluded that Emery had failed to carry her burden of alleging that she was entitled to relief from Rule 9(b)'s particularity requirements. (*Id.* at 4.)

With regard to Emery's "enterprise" allegations, the court recognized that Emery was seeking to impose RICO liability simply by showing that the pattern of predicate acts was committed by a firm that has agents or affiliates. "That is not enough," the court concluded, finding that Emery had failed to allege that the RICO defendants had conducted, or participated

in the conduct of, the affairs of the alleged RICO enterprises. (App. 5.) The court also rejected Emery's "John Doe" claim because it sought to impose RICO liability on the absurd assumption that, because corporations must act through natural persons, there *must be* natural persons who can be charged with a RICO violation whenever a corporation is alleged to have engaged in racketeering activities. (App. 7 (noting that the "John Doe" claim attempts to "truncate the statute in the manner that strikes us as inadmissible").)

REASONS FOR DENYING THE WRIT

In the decision below, a unanimous panel of the Seventh Circuit rejected Emery's third attempt to plead a RICO claim on two separate and independent grounds. In so doing, the court of appeals simply applied settled and uncontroversial law to Emery's pleadings. Consequently, there is nothing in this essentially routine, fact-bound case that merits this Court's review. The Petition should therefore be denied.

I. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED LAW IN FINDING THAT EMERY HAD FAILED TO PLEAD MORE THAN ONE INSTANCE OF MAIL FRAUD.

Emery cannot and does not dispute that she was required to plead more than one instance of mail fraud. *See* 18 U.S.C. § 1961(5) (defining pattern of racketeering activity as consisting of two or more predicate acts); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (RICO requires at least two predicate acts to plead a pattern of racketeering activity). She even admits, as she must, that the two or more instances of mail fraud "must be pleaded with particularity under Fed. R. Civ. P. 9(b)." (Petition at 15.) Her only quibble appears to be with the degree of specificity required by Rule 9(b) and the courts below. Thus, Emery contends that she could not provide the

necessary details because she was "precluded from taking any discovery concerning these matters" and because "the identities of the other recipients were completely within the purview of the defendants." (*Id.* at 16.) Not only is that contention wrong, but Emery offers no reason why the court of appeals' application of settled legal principles to this fact-pleading issue merits review by this Court.

1. The court of appeals recognized that Emery did not have the benefit of discovery. (App. 4.) Nevertheless, the court followed the general rule in finding that Emery could have satisfied Rule 9(b) by "showing that further particulars of the alleged fraud could not have been obtained without discovery." (*Id.*) On the basis of the facts alleged by Emery, however, the court of appeals concluded that she "did not make that showing." (*Id.*) The court of appeals' conclusion was based on the fact the complaint made no such allegation and Emery's counsel admitted at oral argument that she did not even attempt to obtain the necessary information. (*Id.*) Indeed, the court of appeals observed that Emery's counsel's "failure at the outset to appreciate the requirements of Rule 9(b) may in conjunction with the passage of time have doomed any efforts to find a second victim of the fraud." (*Id.*)[3]

2. The ruling below is entirely consistent with the cases Emery cites. (*See* Petition at 16 (citing *New England Data Serv., Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987); *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674 (6th Cir. 1988); *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344 (7th Cir. 1992).) One of those cases actually reached the same conclusion as the court below. *See Schiffels*, 978 F.2d at 353 (refusing to relax Rule 9(b) because plaintiff did not "suggest

---

[3] Requiring a plaintiff to conduct an investigation prior to filing a complaint is not as revolutionary as Emery appears to suggest. Rule 11 of the Federal Rules of Civil Procedure requires just that. *See* Fed. R. Civ. P. 11.

that she did not have access to the allegedly fraudulent documents"). In the other two cases, the courts relaxed Rule 9(b)'s pleading requirements only when the plaintiffs made the requisite showing that the particulars of the alleged fraud were peculiarly within the defendants' knowledge. *See Michaels Bldg. Co.*, 848 F.2d at 680 (Rule 9(b) is "relaxed where information is *only* within the opposing party' knowledge") (emphasis added); *New England Data Serv.*, 829 F.2d at 290-91 (noting that it was "seemingly impossible" for plaintiff to have known the missing facts). None of those cases supports Emery, who simply failed to make the requisite showing that she could not have obtained the missing information elsewhere. (App. 4.)[4]

3. As she did below, Emery continues to ignore the patent defects in her "pattern" allegations that the court of appeals identified. With respect to Chalmers, the court of appeals concluded that Emery's allegations of mail fraud were contradicted by the very documents she had attached to her complaint:

> [T]he only solicitation the lawyer has come up with is an innocuous couple of sentences in the monthly loan statement that [AGFI] sent this "victim"; moreover, as the statement carries the same date as the refinancing, it could not have caused this "victim" any harm.

(App. 2-3.) With respect to Gill and Carr, the court of appeals concluded that Emery had failed to plead mail fraud because she

---

[4] Nor could she have made such a showing. Whether any other persons, including the alleged "additional victims" --- Gill, Carr, and Chalmers -- actually received and were misled by a mailing from Respondents is a matter solely within their knowledge.

had failed to plead with particularity that they had received and were misled by a fraudulent mailing. (*Id.*)

4. The court of appeals ruling on this issue presents only a garden-variety application of the pleading requirements of Rule 9(b) to the "pattern" element of RICO. Even if there were some issue as to whether Emery had made a sufficient showing to be entitled to relief from Rule 9(b)'s requirements, Emery has not demonstrated that the resolution of this fact-specific issue merits review by this Court.

II. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED LAW IN FINDING THAT EMERY HAD FAILED TO PLEAD A VIABLE RICO ENTERPRISE DISTINCT FROM THE ALLEGED RICO PERSON.

Emery contends that the court of appeals held that "a corporate subsidiary can *never* be a RICO person." (Petition at 9 (emphasis in original).) The court of appeals held no such thing. Emery's argument is based on a flagrant distortion of the ruling below and mischaracterizes the applicable decisions of the Seventh Circuit and other federal courts of appeals. In fact, the decision below merely applied well-settled legal precedents from this Court and several courts of appeals and concluded that Emery had not sufficiently pleaded (i) a RICO person distinct from the alleged RICO enterprises, or (ii) that the alleged RICO persons conducted or participated in the conduct of the enterprises through a pattern of racketeering activity.[5]

---

[5] Emery's Second Amended Complaint alleged *"nine different combinations"* of RICO persons and enterprises, comprised of various subsidiaries, parents and "corporate groups." (Petition at 5 (emphasis in original).) Emery argues that the court of appeals ruling was in error only insofar as it applied to five of these mix-and-match combinations -- those involving a RICO person that was a subsidiary and a RICO enterprise that was a

1. Instead of breaking new ground, as Emery suggests, the court of appeals merely rejected Emery's contention that:

> the requirement . . . that defendants conducted the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(c), is satisfied merely by showing that the pattern of predicate acts (the mail frauds in this case) were committed by a firm that has agents or affiliates.

(App. 5.) "[T]hat is not enough," the court held, because Emery was required to plead (i) that each of the RICO persons conducted the affairs of each of the RICO enterprises (and was not just conducting its own corporate affairs or "exercising power that is inherent in its ownership of wholly-owned subsidiaries"), and (ii) that each of the RICO enterprises was more than simply a combination of companies affiliated with a defendant corporation. (App. 5-6.)

2. In so holding, the court of appeals did not even come close to declaring that "a corporate subsidiary could *never* be a RICO person." (Petition at 9.) To the contrary, the court of appeals specifically acknowledged that a subsidiary, under the appropriate circumstances, would be a proper RICO person alleged to have conducted the affairs of a RICO enterprise comprised of its parent corporation and affiliates. (App. 6 (citing *Haroco, Inc. v. Am. Nat'l Bank Co.*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).) *See also Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) ("a manufacturer could use its dealers or other agents or affiliates in such a way as to bring about the sort of abuse at which RICO is aimed, in which event it might be possible to characterize the assemblage as a RICO enterprise"). Consequently, the decision below in no way conflicts with the string-cites of cases in the Petition that stand only for the

---

> parent corporation or a "corporate group" headed by a parent corporation. (Petition at 8.)

unremarkable proposition that individuals and "individual members of corporate groups *can* constitute RICO persons." (Petition at 12 (emphasis added).)

3. The decision below is also entirely consistent with the pleading requirements imposed by RICO itself. Section 1962(c) requires a plaintiff to allege that the RICO person is (i) distinct from the RICO enterprise *and* (ii) conducts, or participates in the conduct of, the affairs of the enterprise through a pattern of racketeering. *See Haroco, Inc. v. Am. Nat'l Bank Co.*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *Reves v. Ernst & Young*, 507 U.S. 170, 184-86 (1993) (to be liable under Section 1962(c), defendants "must participate in the operation or management of the enterprise itself" and "not just in their *own* affairs") (emphasis in original). *See also Richmond v. Nationwide Cassel, L.P.*, 52 F.3d 640, 646-47 (7th Cir. 1995) (noting that in the corporate context "it is more likely that the alleged enterprise is in reality no different from the association of individuals or entities that constitute the defendant or carry out its affairs").

4. The court of appeals was correct in affirming the dismissal of Emery's RICO claim because Emery's factual allegations failed to satisfy the well-settled "conduct or participate" and "distinctiveness" requirements of a Section 1962(c) claim under RICO. That ruling does not, in fact, conflict with any ruling from any other federal courts of appeals and presents no issue warranting review by this Court.

III. THE DECISION BELOW CORRECTLY REJECTED PETITIONER'S "JOHN DOE" CLAIM AND DOES NOT CONFLICT WITH THE FIRST CIRCUIT'S DECISION IN *ORETO*.

Emery claims that the court of appeals "appears . . . to have based its dismissal of the 'John Does' claims in part upon the notion that individual RICO defendants must be in positions

of corporate control" and contends that this holding is in conflict with that of the First Circuit in *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994). (Petition at 15.) As with Emery's other arguments, this contention fails principally because Emery misstates the court of appeals holding to create a "conflict" where none exists.

1. What the court of appeals actually rejected was Emery's attempt to create a RICO claim out of whole cloth simply by assuming that, because a corporation can only act through natural persons, there must be "John Does 1-10" who can be charged with a RICO violation every time a corporation is charged with fraud:

> It is one thing to allege that criminals are using a corporation to commit crimes, a natural meaning to impress on the statutory language of conducting an enterprise's affairs through a pattern of racketeering activity, and another to assert merely that since the corporation's unlawful scheme must have been hatched by someone connected to the corporation, the scheme (provided it satisfies the statute's pattern requirement) violates RICO.

(App. 6.)

2. Far from holding that "individual RICO defendants must be in positions of corporate control" in order to be subject to RICO liability (Petition at 15), the court of appeals actually *agreed* with the general proposition that "an allegation that corporate officers or employees are using their corporation to perpetrate the frauds or other predicate acts satisfies the 'conduct the affairs through' requirement [of the Section 1962(c)]." (App. 6 (citing *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267-68 (3d Cir. 1995).) The court of appeals merely concluded that, in this case, Emery's allegations did not sufficiently allege how the Does "conducted

or participated" in the affairs of the alleged RICO enterprises. (App. 8.)

3. Contrary to Emery's contention, the decision below is entirely consistent with *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994). In fact, the Seventh Circuit actually cited *Oreto* with approval and specifically noted that a RICO defendant need *not* be an owner or even a member of top management in order to be liable for conducting the affairs of an enterprise through a pattern of racketeering activity. (App. 7.) The court of appeals simply concluded that the "conduct or participate" requirement was not satisfied in this case because Emery failed to allege that the Does did *anything*. (App. 8.) Indeed, merely mimicking the statutory language, all that Emery alleged here was that the Does "devis[ed]" undescribed "policies" and "conducted or participated in the affairs" of the three alleged enterprises "through a pattern of racketeering." (App. 21, 38 (¶¶ 12, 101-102).)

4. Taken a very short step to its logical conclusion, the illusory pleading employed by Emery would enable any plaintiff to transform virtually any individual claim of fraud against a corporation into a federal racketeering charge:

> There can be no corporate fraud without a deviser, that is without a human inventor, so that if "devisers" are RICO violators there would be a RICO violation whenever a corporation engaged in a pattern of racketeering activity -- and thus automatically -- even though the statute makes the conduct of or participation in the corporation's affairs a separate element of liability.

(App. 8.) The court of appeals was, therefore, entirely correct to reject the "John Doe" claim. There is no authority to the contrary and there is no basis presented for review by this Court.

CONCLUSION

For all the reasons stated above, Respondents American General Finance, Inc. and American General Finance Corp. respectfully request that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PAUL W. SCHROEDER
Counsel of Record
JAMES R. DALY
JAYANT W. TAMBE
JONES, DAY, REAVIS & POGUE
77 WEST WACKER DRIVE
CHICAGO, ILLINOIS 60606
(312) 782-3939

Counsel for Respondents

Dated: June 29, 1998